

JOHN COZY,)	
)	
Petitioner,)	3:09-cv-0250-RCJ-WGC
)	
vs.)	ORDER
)	
JACK PALMER, <i>et al.</i> ,)	
)	
Respondents.)	
	/	

I. Background and Procedural History

¹ The exhibits referenced in this order are found in the Court's record at ECF Nos. 14-17.

1 The defendants' trial commenced on August 5, 2004.² (Exhibit 12). During trial, the State
2 amended the information, dismissing Count IV against petitioner. (Exhibit 11).

3 On August 6, 2004, the jury found petitioner guilty of Counts I, III, and III. (Exhibit 16). On
4 Count I, petitioner was sentenced to 12 months in county jail. (Exhibit 22, at p. 5). The court
5 adjudicated petitioner a habitual felon pursuant to NRS 207.010(b). (Exhibit 22). On Count II,
6 petitioner was sentenced 10 years to life in prison, concurrent with Count I. (*Id.*) On Count III,
7 petitioner was sentenced to 10 years to life, concurrent with Count II. (*Id.*). The judgment of
8 conviction was entered on October 18, 2004. (Exhibit 24).

9 Petitioner appealed the judgment of conviction. (Exhibits 25 and 27). On March 28, 2006,
10 while his direct appeal was still pending, petitioner filed a post-conviction habeas petition in the state
11 district court. (Exhibits 61, 62). The state district court never ruled on petitioner's first state habeas
12 petition.

13 On September 12, 2006, petitioner filed his opening brief on direct appeal in the Nevada
14 Supreme Court. (Exhibit 81). Petitioner presented three issues on direct appeal: (1) defendant's
15 Fourteenth Amendment rights were violated when he was compelled to stand trial in jail attire; (2)
16 the evidence was insufficient; and (3) prosecutorial misconduct denied petitioner a fair trial.
17 (Exhibit 81). On June 8, 2007, the Nevada Supreme Court affirmed petitioner's judgment of
18 conviction. (Exhibit 87). Remittitur issued on July 5, 2007. (Exhibit 90).

19 On September 19, 2007, petitioner filed a second state post-conviction habeas petition, in
20 which he raised three grounds for relief. (Exhibit 91). On December 18, 2007, the state district
21 court denied petitioner's second habeas petition. (Exhibit 94). Petitioner appealed. (Exhibit 96).

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25 ² On the first day of trial, defendants Childress and Sheffield pleaded guilty and were dismissed
26 from the case. (Exhibit 12, at pp. 7-12 (Sheffield) and pp. 63-66 (Childress)).

1 On February 28, 2008, petitioner filed his third post-conviction habeas petition in the state
2 district court. (Exhibit 103). On June 10, 2008, the state district court summarily dismissed the third
3 habeas petition. (Exhibit 104). Petitioner appealed. (Exhibit 106).

4 On March 10, 2009, the Nevada Supreme Court consolidated petitioner's appeals from the
5 denial of his second and third state habeas petitions. (Exhibit 110, at p. 1). The Nevada Supreme
6 Court affirmed the district court's denial of petitioner's second and third state habeas petitions.
7 (Exhibit 110). Remittitur issued on April 14, 2009. (Exhibit 112).

8 This Court received petitioner's federal habeas petition on May 14, 2009. (ECF No. 1). The
9 Court directed the petition to be filed, by order entered on June 22, 2009. (ECF No. 3). The petition
10 raises three grounds containing several sub-claims. (ECF No. 4). Respondents previously filed a
11 motion to dismiss the petition. (ECF No. 13). By order filed August 24, 2010, this Court granted in
12 part, and denied in part, the motion to dismiss. (ECF No. 24). The Court dismissed with prejudice
13 Grounds 1(D), 2(D), 2(E), and Ground 3 of the federal petition. The Court also dismissed with
14 prejudice the equal protection claims of Grounds 1(A), 1(B), and 1(C). (*Id.*). The Court directed
15 respondents to file an answer to the remaining grounds of the petition, which include the due process
16 claims in Grounds 1(A), 1(B), and 1(C), as well as Grounds 2(A), 2(B), 2(C), and 2(F). (*Id.*).

17 Respondents have filed an answer to the remaining grounds of the petition. (ECF No. 27).
18 Petitioner has filed a reply to the answer. (ECF No. 34). The Court now reviews the merits of the
19 remaining grounds of the petition.

20 **II. Federal Habeas Corpus Standards**

21 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. § 2254(d),
22 provides the legal standard for the Court's consideration of this habeas petition:

23 An application for a writ of habeas corpus on behalf of a person
24 in custody pursuant to the judgment of a State court shall not be
25 granted with respect to any claim that was adjudicated on the merits in
26 State court proceedings unless the adjudication of the claim –

1 (1) resulted in a decision that was contrary to, or involved an
2 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

3 (2) resulted in a decision that was based on an unreasonable
4 determination of the facts in light of the evidence presented in the State
court proceeding.

5 The AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications
6 in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect
7 to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state court
8 decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C.
9 § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme
10 Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from
11 a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme
12 Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529
13 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

14 A state court decision is an unreasonable application of clearly established Supreme Court
15 precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct
16 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that
17 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,
18 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more
19 than merely incorrect or erroneous; the state court’s application of clearly established federal law
20 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

21 In determining whether a state court decision is contrary to, or an unreasonable application of
22 federal law, this Court looks to the state courts’ last reasoned decision. *See Ylst v. Nunnemaker*, 501
23 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000), *cert.*
24 *denied*, 534 U.S. 944 (2001). Moreover, “a determination of a factual issue made by a State court
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1 shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting the
2 presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

3 **III. Discussion**

4 **A. Ground 1(A)**

5 Petitioner alleges that his due process right to a fair trial was violated because he was
6 compelled to stand trial in jail attire. (ECF No. 4, at pp. 3-4). The Nevada Supreme Court ruled on
7 this issue, as follows:

8 Cozy next contends that his right to a fair trial was violated because he
9 was compelled to stand trial in identifiable prison clothes. We
10 disagree. Although Cozy was wearing his prison-issue blue trousers
11 during trial, the trousers were turned inside out so that the prison
12 stenciling could not be seen. Cozy also wore a plain, unidentifiable
13 shirt. Although Cozy was wearing prison-issue socks and shoes, there
14 were no visible markings that identified them as prison attire. Under
15 the circumstances, we conclude that nothing in the record suggests that
16 the clothes that Cozy was wearing were readily identifiable to jurors as
17 prison attire, and we conclude that appellant was not prejudiced.

18 (Exhibit 87, at pp. 2-3) (footnotes omitted). The Nevada Supreme Court applied the correct federal
19 standard, citing *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (finding constitutional error where
20 defendant appeared in trial clothes that were distinctly marked as “prison issue”). (Exhibit 87, at p.
21 2, n.2). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1).
22 Petitioner has failed to meet his burden of proving that the Nevada Supreme Court’s ruling was
23 contrary to, or involved an unreasonable application of, clearly established federal law, as
24 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
25 determination of the facts in light of the evidence presented in the state court proceeding. This Court
26 denies habeas relief as to Ground 1(A).

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26 **B. Ground 1(B)**

Petitioner claims that his due process right to a fair trial was violated because there was insufficient evidence to support his convictions for conspiracy to commit larceny, grand larceny, or possession of a credit card without the cardholder's consent. (ECF No. 4, at pp. 4-6).

When a habeas petitioner challenges the sufficiency of evidence to support his conviction, the court reviews the record to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000). The *Jackson* standard does not focus on whether a correct guilt or innocence determination was made, but whether the jury made a rational decision to convict or acquit. *Herrera v. Collins*, 506 U.S. 390, 402 (1993). Under the *Jackson* standard, the prosecution has no obligation to rule out every hypothesis except guilt. *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion); *Jackson*, 443 U.S. at 326; *Schell*, 218 F.3d at 1023. *Jackson* presents "a high standard" to habeas petitioners claiming insufficiency of the evidence. *Jones v. Wood*, 207 F.3d 557, 563 (9th Cir. 2000).

Sufficiency claims are limited to a review of the record evidence submitted at trial. *Herrera*, 506 U.S. at 402. Such claims are judged by the elements defined by state law. *Jackson*, 443 U.S. at 324, n.16). The reviewing court must respect the exclusive province of the fact-finder to determine the credibility of witnesses, to resolve evidentiary conflicts, and to draw reasonable inferences from proven facts. *United States v. Hubbard*, 96 F.3d 1223, 1226 (9th Cir. 1996). The district court must assume the trier of fact resolved any evidentiary conflicts in favor of the prosecution, even if the determination does not appear on the record, and must defer to that resolution. *Jackson*, 443, U.S. at 326.

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1. Convictions for Conspiracy and Grand Larceny

1 In Nevada, conspiracy is “an agreement between two or more persons for an unlawful
2 purpose.” *Thomas v. State*, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998); Nev. Rev. Stat.
3 199.480 (“conspiracy occurs “[w]hen two or more persons conspire . . . to accomplish any
4 criminal or unlawful purpose . . .”). Conspiracy is seldom demonstrated by direct proof and is
5 usually established by inference from the conduct of the conspirators. *Thomas*, 114 Nev. at 1143,
6 967 P.2d at 1122. A person commits the crime of grand larceny when that person “[i]ntentionally
7 steals, takes and carries away, lead away or drives away . . . personal goods or property, with the
8 value of \$250 or more, owned by another person.” Nev. Rev. Stat. 205.220.

9 At trial, the victim testified that she was playing video poker on March 1, 2004, at the Luxor
10 casino in Las Vegas, Nevada. (Exhibit 12C, at p. 80). When she sat down to play video poker, the
11 victim placed her purse in the machine’s coin receptacle. (Exhibit 12C, at p. 87). Inside the victim’s
12 purse were her driver’s license, Mastercard credit card, insurance cards, and approximately one
13 thousand dollars in cash. (Exhibit 12C, at pp. 92-93, 96). As she played video poker, the victim was
14 approached by two African-American males later identified as Childress and Sheffield. (Exhibit 12C,
15 at pp. 81-84). Childress asked if he could shake her hand in return for giving him directions to the
16 buffet. (Exhibit 12C, at pp. 84-85). The victim agreed to do so, but pulled her hand away when
17 Childress shook her hand for an unusually long and socially unacceptable time. (Exhibit 12C, at pp.
18 85-86). A few moments later, the victim noticed that her purse was missing and informed a Luxor
19 employee that she believed she had been robbed. (Exhibit 12C, at pp. 88-89).

20 After the victim reported her purse missing, William Miernicki, a casino security guard,
21 received a radio call informing him that two black males, between the ages of 40-50 years old, had
22 taken a purse from a hotel guest. (Exhibit 12C, at p. 109). Miernicki testified that he went to the
23 casino’s 30-minute parking lot where he observed three black males in a blue Suzuki Samurai drive
24 away. (*Id.*). Miernicki testified that this vehicle was not parked in the lot fifteen minutes before the
25 radio call. (*Id.*). Miernicki followed the vehicle to the end of the casino property and instructed a
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1 casino dispatcher to contact the Las Vegas Metro Police Department (LVMPD) with a description of
2 the vehicle. (Exhibit 12C, at p. 110).

3 With ten minutes of being supplied with a description of the vehicle, Sergeant Victor Dumas
4 of the LVMPD located the Suzuki Samuri and pulled it over at a nearby gas station. (Exhibit 18A, at
5 p. 19). Once other officers arrived, including Officer Edward Ortega, the suspects were directed to
6 exit the vehicle. (Exhibit 18B, at p. 41). Two of these suspects were subsequently identified by the
7 victim, who had been transported to the scene, as the men who took her purse. (Exhibit 12C, at pp.
8 90-91).

9 Officer Ortega testified that he conducted a pat-down search on petitioner Cozy, the third
10 suspect, and observed a bundle of papers in Cozy's shirt pocket. (Exhibit 18B, at pp. 43-44).
11 Among these papers were the victim's California driver's license, credit card, insurance card, and
12 approximately fifty dollars in cash. (Exhibit 18B, at p. 43). When asked about the driver's license,
13 petitioner Cozy stated the license belonged to a friend of his in California. (Exhibit 18B, at p. 44).
14 After conducting similar searches on Childress and Sheffield, the officers found more than nine
15 hundred dollars in cash. (Exhibit 18B, at p. 45). The police later obtained a casino surveillance
16 video which clearly depicted Sheffield taking the taking the victim's purse while Childress distracted
17 her. (Exhibit 12C, at pp. 100-02). The discarded purse was later located and returned to the victim.
18 (Exhibit 18B, at pp. 35-37).

19 Trial testimony concerning petitioner's conduct following the taking of the purse provides
20 ample proof of his participation in the crimes of conspiracy to commit larceny and grand larceny.
21 This includes (1) Petitioner was present inside the vehicle with Sheffield and Childress shortly after
22 the purse was taken (Exhibit 18B, at pp. 40-42); (2) Petitioner was found in physical possession of
23 the victim's driver's license, credit card, and insurance card (Exhibit 18B, at p. 43); (3) Petitioner
24 lied to police and stated that the driver's license belonged to a friend from California (Exhibit 18B, at
25 p. 44); (4) the victim's purse, absent its valuable items, was discarded shortly after it was stolen
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1 (Exhibit 18B, at pp. 35-37); (5) the victim's money had been split up between the three suspects
2 (Exhibit 18B, at pp. 35-37); and (6) Petitioner was fleeing the scene of the crime when he and his
3 cohorts were pulled over by police. (Exhibit 18B, at pp. 40-42). This evidence was presented to the
4 jury and provided abundant evidence of petitioner's participation in the crimes of conspiracy to
5 commit larceny and grand larceny. Petitioner's claim is without merit.

6 **2. Conviction for Possession of Credit or Debit Card**

7 Petitioner also asserts that his conviction for possession of a credit or debit card without the
8 cardholder's consent was based on insufficient evidence. Under Nevada law, a person commits this
9 crime when the person possesses "a credit card or debit card without the consent of the cardholder
10 and with the intent to circulate, use, sell or transfer the credit card." Nev. Rev. Stat. 205.690.

11 Trial testimony established that petitioner: (1) fled the scene on the crime (Exhibit 18B, at pp.
12 40-42; (2) physically possessed the credit card of the victim (Exhibit 18B, at p. 43); (3) lied to police
13 when questioned about the victim's driver's license and credit card (Exhibit 18B, at p. 44); and (4)
14 along with Sheffield and Childress, discarded the victim's purse after removing all items of value
15 (Exhibit 18B, at pp. 35-37). The evidence at trial showed that petitioner knew the credit card was
16 stolen and intended to use, circulate, sell, or transfer the card.

17 The Nevada Supreme Court found and held as follows:

18 Cozy first contends that the evidence presented at trial was
19 insufficient to support the jury's finding of guilt. Our review of the
20 record on appeal, however, reveals sufficient evidence to establish
guilt beyond a reasonable doubt as determined by a rational trier of
fact.

21 In particular, we note that Cozy was found shortly after the
22 victim's purse was stolen, and he was in possession of the victim's
23 driver's license, credit card and insurance card. Cozy was in a car with
24 the two individuals who were identified by the victim as having been
25 present when the victim's purse disappeared. A surveillance video
showed those two individuals distracting the victim and taking her
purse. When questioned by police, Cozy lied and told the police that
the victim's driver's license belonged to a friend of his from
California.

1 The jury could reasonably infer from the evidence presented
2 that Cozy conspired with his co-defendants to steal the victim's purse,
3 that he knew that the credit card was stolen and he intended to use it.
4 It is for the jury to determine the weight and credibility to give
5 conflicting testimony, and the jury's verdict will not be disturbed on
6 appeal, where, as here, substantial evidence supports the verdict.

7 (Exhibit 87, at pp. 1-2) (footnotes omitted). The factual findings of the state court are presumed
8 correct. 28 U.S.C. § 2254(e)(1). The Nevada Supreme Court applied the correct federal
9 constitutional standard. (Exhibit 87, at p. 2, n.2 (citing *McNair v. State*, 108 Nev. 53 (1992) (citing
10 *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). Petitioner has failed to meet his burden of proving
11 that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of,
12 clearly established federal law, as determined by the United States Supreme Court, or that the ruling
13 was based on an unreasonable determination of the facts in light of the evidence presented in the
14 state court proceeding. The Court denies habeas relief as to Ground 1(B).

15 **C. Ground 1(C)**

16 Petitioner claims that his right to due process was violated due to prosecutorial misconduct
17 during closing arguments. Petitioner alleges that three statements made by prosecutors during
18 closing arguments violated his right to due process. (ECF No. 4, at pp. 6-10).

19 In reviewing prosecutorial misconduct claims, the narrow issue that the federal habeas court
20 may consider is whether there was a violation of due process, and not whether there was misconduct
21 under the court's broad exercise of supervisory power. *Darden v. Wainwright*, 477 U.S. 168, 181
22 (1986). The test is whether the conduct "so infected the trial with unfairness as to make the resulting
23 conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The
24 court must distinguish ordinary trial error of a prosecutor from that sort of egregious misconduct
25 which amounts to a constitutional violation of due process. *Smith v. Phillips*, 455 U.S. 209, 221
26 (1982). The question before the court is not whether misconduct denied a fair trial, but whether the
state court's conclusion was an unreasonable application of clearly established federal law under 28
U.S.C. § 2254(d)(1). See *Frazier v. Huffman*, 343 F.3d 780, 793 (6th Cir. 2003).

1 Failure of counsel to object to misconduct implies that counsel did not discern any prejudice.
2 *See Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002) (while not dispositive, failure to object is
3 relevant on the issue of fundamental fairness). Where a prosecutorial misconduct claim is waived
4 for failure to object and request an admonition, such failure is a factor in the default of the claim.
5 *Rich v. Calderon*, 187 F.3d 1064, 1070 (9th Cir. 1999). If a cautionary instruction is given by the
6 trial court, the jury is presumed to follow it. *Drayden v. White*, 232 F.3d 704, 713 (9th Cir. 2000).

7 In the instant case, petitioner alleges that three statements made by prosecutors during closing
8 arguments violated his right to due process. First, petitioner alleges that the prosecutor argued that
9 petitioner was the driver of the blue Suzuki Samurai, a fact not in evidence. On review of the record,
10 the prosecutor did state that petitioner was “driving the get-away car.” (Exhibit 18B, at pp. 53-54).
11 Taken in context, the prosecutor was drawing reasonable inferences from the evidence, not arguing
12 that any specific witness testified that petitioner was the driver. Moreover, this statement was
13 clarified by the prosecution in rebuttal – acknowledging that the State could not prove beyond a
14 reasonable doubt that petitioner was driving the vehicle at the time it left the casino or when it was
15 pulled over by police. (Exhibit 18B, at p. 71). Jury instruction #15 directed the jury that “whatever
16 counsel may say, you will bear in mind that it is your duty to be governed in your deliberations by the
17 evidence as you understand it and remember it to be” (Exhibit 15). As such, the prosecutor’s
18 statement that petitioner was the driver of the vehicle did not constitute misconduct, and any
19 prejudicial effect was remedied through the subsequent clarification by the prosecutor and by jury
20 instruction #15.

21 Second, petitioner alleges that the prosecution committed prejudicial misconduct by
22 expressing a personal belief or opinion in closing argument. Prosecutor Brian Rutledge stated in
23 rebuttal argument:

24 Who was the driver? Well, as Mr. Hendricks told you, we know that
25 Mr. – because of when the car was parked there, it had been brought
26 there in the last twenty minutes, the other two were in the casino, Mr.
Cozy had to bring it.

1 (Exhibit 18B, at p. 71). The statement was a reference to what prosecutor Mr. Hendricks stated in
2 the initial closing argument. The statement was not one of personal belief or opinion. Petitioner has
3 failed to show any prosecutorial misconduct or prejudice regarding this statement.

4 Third, petitioner argues that the prosecution committed misconduct by improperly
5 commenting on his choice not to testify at trial. The prosecutor stated:

6 Why is he in the vehicle, the get-away vehicle, out here waiting for
7 these individuals as they come running out, hop in the car and away
8 they go. Now, he may have a better story if – not just, this is a friend
9 of mine, if those cards had been laying, you know, in the back seat,
somewhere on the floor, somewhere else, but they were located on his
person inside his shirt pocket.

10 (Exhibit 18B, at p. 54). In stating that “he may have a better story,” the prosecutor was commenting
11 on the false statement made by petitioner when questioned about the victim’s driver’s license. The
12 prosecutor’s statement did not comment on petitioner’s refusal to testify. Petitioner has failed to
13 show that the statement constituted prosecutorial misconduct or resulted in prejudice. Petitioner
14 failed to object to any of the alleged acts of prosecutorial misconduct. Petitioner has not shown that
15 the alleged acts of prosecutorial misconduct were so prejudicial as to “infect the trial with unfairness
16 making the resulting conviction a denial of due process.” *Donnelly*, 416 U.S. at 643.

17 The Nevada Supreme Court addressed petitioner’s claim of prosecutorial misconduct as
18 follows:

19 Finally, Cozy contends that the prosecutor’s comments during closing
20 argument constitute prosecutorial misconduct that warrants reversal.
21 Cozy did not object to the prosecutor’s comments, and the failure to
22 object to the alleged prosecutorial misconduct precludes appellate
consideration absent plain error. We conclude that Cozy has failed to
demonstrate that the prosecutor’s comments affected his substantial
rights or prejudiced him in any way amounting to reversible plain
error.

23 (Exhibit 87, at p. 3) (footnotes omitted). The factual findings of the state court are presumed correct.
24 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the Nevada Supreme
25 Court’s ruling was contrary to, or involved an unreasonable application of, clearly established federal
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1 law, as determined by the United States Supreme Court, or that the ruling was based on an
2 unreasonable determination of the facts in light of the evidence presented in the state court
3 proceeding. The Court denies habeas relief as to Ground 1(C).

4 **D. Ineffective Assistance of Counsel Claims**

5 In Grounds 2(A), 2(B), 2(C), and 2(F), petitioner claims violations of his Sixth Amendment
6 right to the effective assistance of counsel. (ECF No. 4, at pp. 14-18, 21-22). Ineffective assistance
7 of counsel claims are governed by the two-part test announced in *Strickland v. Washington*, 466 U.S.
8 668 (1984). In *Strickland*, the Supreme Court held that a petitioner claiming ineffective assistance of
9 counsel has the burden of demonstrating that (1) the attorney made errors so serious that he or she
10 was not functioning as the “counsel” guaranteed by the Sixth Amendment, and (2) that the deficient
11 performance prejudiced the defense. *Williams v. Taylor*, 529 U.S. 362, 390-391 (2000) (citing
12 *Strickland*, 466 U.S. at 687). To establish ineffectiveness, the defendant must show that counsel’s
13 representation fell below an objective standard of reasonableness. *Id.* To establish prejudice, the
14 defendant must show that there is a reasonable probability that, but for counsel’s unprofessional
15 errors, the result of the proceeding would have been different. *Id.* A reasonable probability is
16 “probability sufficient to undermine confidence in the outcome.” *Id.* Additionally, any review of the
17 attorney’s performance must be “highly deferential” and must adopt counsel’s perspective at the time
18 of the challenged conduct, in order to avoid the distorting effects of hindsight. *Strickland*, 466 U.S.
19 at 689. It is the petitioner’s burden to overcome the presumption that counsel’s actions might be
20 considered sound trial strategy. *Id.*

21 Ineffective assistance of counsel under *Strickland* requires a showing of deficient
22 performance of counsel resulting in prejudice, “with performance being measured against an
23 ‘objective standard of reasonableness,’ . . . ‘under prevailing professional norms.’” *Rompilla v.*
24 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an
25 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary
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1 to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1,
 2 5 (2003). There is a strong presumption that counsel's conduct falls within the wide range of
 3 reasonable professional assistance. *Id.*

4 The United States Supreme Court has described federal review of a state supreme court's
 5 decision on a claim of ineffective assistance of counsel as "doubly deferential." *Cullen v. Pinholster*,
 6 131 S.Ct. 1388, 1403 (2011) (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1413 (2009)). The
 7 United States Supreme Court emphasized that: "We take a 'highly deferential' look at counsel's
 8 performance . . . through the 'deferential lens of § 2254(d).'" *Id.* at 1403 (internal citations
 9 omitted). Moreover, federal habeas review of an ineffective assistance of counsel claim is limited to
 10 the record before the state court that adjudicated the claim on the merits. *Cullen v. Pinholster*, 131
 11 S.Ct. at 1398-1401.

12 **1. Ground 2(A)**

13 Petitioner alleges that his trial counsel was ineffective for failing to object to jury instructions
 14 #6 and #14. (ECF No. 4, at p. 14).

15 **a. Jury Instruction #6**

16 As to jury instruction #6, petitioner asserts that the instruction allowed the jury to convict him
 17 without proof of the requisite state of mind. Nevada's conspiracy statute states that a conspiracy
 18 occurs when two or more persons conspire to commit a crime. Nev. Rev. State. 199.480. Further,
 19 each conspirator must possess the requisite intent to commit the crimes performed in furtherance of
 20 the conspiracy. *Bolden v. State*, 121 Nev. 908, 922, 124 P.3d 191, 200-01 (2005), *overruled on other*
 21 *grounds by Cortinas v. State*, 195 P.3d 315, 324 (Nev. 2008); *see also Sharma v. State*, 118 Nev.
 22 648, 56 P.3d 868 (2002). Jury instruction #6 discussed co-conspirator liability as follows:

23 Each member of a criminal conspiracy is liable for each act and bound
 24 by each declaration of every other member of the conspiracy if the act
 or the declaration is in furtherance of the object of the conspiracy.

25 The act of one conspirator pursuant to or in furtherance of the common
 26 design of the conspiracy is the act of all conspirators. Every

1 conspirator is legally responsible for an act of a co-conspirator that
2 follows as one of the probable and natural consequences of the object
3 of the conspiracy even if it was not intended as part of the original plan
and even if the was not present at the time of the commission of such
act.

4 (Exhibit 15, at p. 8). A jury instruction may not be judged in isolation, “but must be considered in
5 the context of the instructions as a whole and the trial record.” *U.S. v. Garcia-Rivera*, 353 F.3d 788,
6 791 (9th Cir. 2003) (citations omitted). Jurors are presumed to follow the instructions that they are
7 given. *U.S. v. Olano*, 507 U.S. 725, 740 (1993). In the instant case, jury instruction #4 instructed the
8 jury that “[t]o be guilty of conspiracy, a defendant must intend to commit, or to aid in the
9 commission of, the specific crime agreed to.” (Exhibit 15, at p. 6). The jury was properly instructed
10 on the state of mind requirement for criminal conspiracy, and the failure of petitioner’s counsel to
11 object to jury instruction #6 does not amount to deficient performance. Petitioner has not shown that
12 prejudice resulted from his counsel’s failure to object to jury instruction #6. There was abundant
13 evidence of petitioner’s guilt, as discussed earlier in this order. Petitioner has not demonstrated a
14 reasonable probability of a different outcome but for his counsel’s failure to object to jury instruction
15 #6. In addressing this claim, the Nevada Supreme Court ruled as follows:

16 [A]ppellant claimed that his trial counsel was ineffective for failing to
17 object to jury instruction no. 6, which discussed coconspirator liability.
18 Appellant claimed that this instruction allowed the jury to convict
19 without proof of the necessary state of mind. Appellant failed to
20 demonstrate that he was prejudiced. Appellant failed to demonstrate a
21 reasonable probability of a different outcome had his trial counsel
22 objected to the challenged instruction given the overwhelming
evidence of appellant’s guilt, including the testimony of the victim and
the police officers. Notably, appellant was found with the victim’s
credit card and her driver’s license shortly after the theft and his
statement to the police that he was holding these items for a friend was
directly contradicted by the victim. Therefore, the district court did not
err in denying this claim.

23 (Exhibit 110, at p. 3) (footnotes omitted). The factual findings of the state court are presumed
24 correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the Nevada
25 Supreme Court’s ruling was contrary to, or involved an unreasonable application of, clearly
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1 established federal law, as determined by the United States Supreme Court, or that the ruling was
2 based on an unreasonable determination of the facts in light of the evidence presented in the state
3 court proceeding. Petitioner's claim is without merit.

4 **b. Jury Instruction #14**

5 Petitioner argues that jury instruction #14 improperly minimized the State's burden of proof
6 and "endorsed a conviction on the theory of 'guilt by association.'" (ECF No. 4, at p. 15). Jury
7 instruction #14 reads as follows:

8 You are here to determine the guilt or innocence of the Defendant from
9 the evidence in the case. You are not called upon to return a verdict as
10 to the guilt or innocence of any other person. So, if the evidence in the
11 case convinces you beyond a reasonable doubt of the guilt of the
12 Defendant, you should so find, even though you may believe one or
13 more persons are also guilty.

14 (Exhibit 15, at p. 16). This jury instruction allowed the jury to properly consider petitioner's
15 presence in the vehicle with Childress and Sheffield, along with all other admissible evidence, in
16 reaching its verdict. Evidence was presented at trial that: (1) petitioner was in physical possession of
17 the victim's credit card and driver's license; and (2) petitioner lied to police when asked about the
18 victim's driver's license. (Exhibit 18B, at pp. 43-44). Petitioner has failed to show that his counsel
19 was ineffective for failing to object to jury instruction #14, or that he was prejudiced by the failure to
20 object. In rejecting petitioner's claim, the Nevada Supreme Court ruled:

21 Third, appellant claimed that his trial counsel was ineffective for
22 failing to object to jury instruction no. 14. Appellant claimed this
23 instruction improperly minimized the State's burden of proof and
24 allowed for conviction due to "guilt by association." Appellant failed
25 to demonstrate that his trial counsel was deficient or that he was
26 prejudiced. The challenged instruction informs the jury that it need
only be concerned with the guilt or innocence of the defendant, and not
the culpability of any other individuals. Appellant failed to
demonstrate how instructing the jury to focus on the guilt or innocence
of appellant alone lessened the State's burden of proof. In addition,
the jury was properly instructed on the reasonable doubt standard as
required by NRS 175.191. Therefore, the district court did not err in
denying this claim.

(Exhibit 110, at p. 4) (footnotes omitted). The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1). Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Habeas relief is denied as to Ground 2(A) in its entirety.

2. Ground 2(B)

Petitioner argues that his trial counsel was ineffective for failing to object to the admission of the Luxor casino surveillance videotape. (ECF No. 4, at pp. 15-16). Plaintiff alleges that his counsel should have objected to the video because "he did not appear anywhere in the video" and the video "exposed the jury to an abundance of irrelevant and prejudicial evidence." (ECF No. 4, at p. 15). The Nevada Supreme considered the alleged poor quality of the videotape and ruled as follows:

First, appellant claimed that his trial counsel was ineffective for failing to object to the admission of the Luxor casino surveillance videotape. Appellant claimed that the videotape was of such low quality that it should not have been admitted. Appellant failed to demonstrate that his trial counsel was deficient or that he was prejudiced. "District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." *Archanian v. State*, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006) (citing *Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004)). We conclude that appellant failed to demonstrate that the district court abused its discretion in admitting the tape and that an objection would have been sustained. Nothing in the record supports appellant's contention that the videotape was of poor quality. Therefore, the district court did not err in denying this claim.

(Exhibit 110, at pp. 2-3).

Questions about the admissibility of evidence are matters of state law. *Bashor v. Risley*, 730 F.2d 1228, 1238 (9th Cir. 1983). The admissibility of evidence is reviewed by a federal habeas court only if the erroneous ruling rendered the state proceedings so fundamentally unfair as to violate due process. *Bueno v. Hallahan*, 988 F.2d 86, 87 (1991). Where evidence is relevant to an issue in the

1 case, a federal habeas court need not explore whether a due process violation has occurred. *See*
2 *Estelle v. McGuire*, 502 U.S. 62, 70 (1991).

3 The surveillance videotape depicts Childress and Sheffield stealing the victim's purse.
4 (Exhibit 12C, at pp. 100-03). It is therefore highly probative to show the occurrence of a theft, an
5 element that the prosecution was required to prove. *See* Nev. Rev. Stat. 205.220. The videotape is
6 probative to show petitioner's participation in a conspiracy to commit larceny by linking the theft to
7 petitioner's subsequent actions. (Exhibit 18B, at pp. 43-44) (trial testimony indicating petitioner was
8 found in possession of the victim's credit card and driver's license, and lied to police when asked
9 about the driver's license). The videotape was probative and relevant to showing the existence of the
10 elements of the crime, and its admission did not violate petitioner's due process rights. *See Estelle v.*
11 *McQuire*, 502 U.S. at 70. Nothing in the record suggests that the videotape prejudiced petitioner.
12 Petitioner has failed to show that his trial counsel was ineffective in failing to object to the admission
13 of the videotape or that he was prejudiced by its admission.

14 Finally, the factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1).
15 Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's ruling was
16 contrary to, or involved an unreasonable application of, clearly established federal law, as
17 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
18 determination of the facts in light of the evidence presented in the state court proceeding. This Court
19 denies habeas relief on Ground 2(B) of the petition.

20 **3. Ground 2(C)**

21 Petitioner asserts that his counsel was ineffective for failing to object to his adjudication as a
22 habitual criminal. (ECF No. 4, at pp. 16-18). Petitioner contends that his trial counsel failed to
23 object when the district court adjudicated him a habitual criminal on the basis of the State's oral
24 argument without examining his prior convictions for constitutional infirmity. (*Id.*, at p. 17). The
25 Nevada Supreme Court considered the state district court's habitual criminal adjudication:
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1 Fifth, appellant claimed that his trial counsel was ineffective for failing
2 to object to his adjudication as a habitual criminal. Appellant claimed
3 that he was improperly adjudicated as a habitual criminal because he
4 was not notified of the State's intent to seek it in the charging
5 document, the issue of habitual criminality was not presented to the
6 jury, or proven beyond a reasonable doubt. Appellant failed to
7 demonstrate that his trial counsel was deficient or that he was
8 prejudiced. The State filed an amended information which noted its
9 intent to seek habitual criminal adjudication. We have held that a
defendant is not entitled to a jury determination of criminal habituality.
See O'Neill v. State, 123 Nev. 9, 153 P.3d 38 (2007); see also Howard
v. State, 83 Nev. 53, 422 P.2d 548 (1967) (holding that the Nevada
Constitution does not require that status as a habitual criminal be
determined by a jury). The State filed three judgments of conviction in
the district court; therefore, appellant failed to demonstrate that there
were insufficient convictions to adjudicate him a habitual criminal.
Therefore, the district court did not err in denying this claim.

10 (Exhibit 110, at pp. 5-6).

11 Nevada's habitual criminal statute authorizes the imposition of greater penalties for persons
12 who commit any felony and who have previously been convicted of three or more felonies. See Nev.
13 Rev. Stat. 207.010(b). A certified copy of a felony conviction constitutes prima facie evidence of the
14 conviction of a prior felony. Nev. Rev. Stat. 207.016(5). "Evidence of a prior conviction does not,
15 on its face, raise a presumption of constitutional infirmity." *Dressler v. State*, 107 Nev. 686, 697-98,
16 819 P.2d 1288, 1295-96 (1991). In this case, the prosecutor filed certified copies of conviction
17 documents establishing that petitioner had been convicted of at least three prior felonies. (Exhibit
18 21; Exhibit 22, at p. 4). The state district court had the documentary evidence it needed for the
19 habitual criminal adjudication at the time of sentencing. (Exhibit 22, at p. 4). Petitioner has not
20 shown that any of the documentation presented to the sentencing court raised a presumption of
21 constitutional infirmity. Petitioner has failed to show that his counsel was ineffective for failing to
22 object to the state district court's adjudication of criminal habituality or that he was prejudiced.

23 The factual findings of the state court are presumed correct. 28 U.S.C. § 2254(e)(1).
24 Petitioner has failed to meet his burden of proving that the state court's ruling was contrary to, or
25 involved an unreasonable application of, clearly established federal law, as determined by the United
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1 States Supreme Court, or that the ruling was based on an unreasonable determination of the facts in
2 light of the evidence presented in the state court proceeding. This Court denies habeas relief on
3 Ground 2(C) of the petition.

4 **4. Ground 2(F)**

5 Petitioner alleges that trial counsel was ineffective for failing to adequately prepare and
6 present the defense theory of the lesser offense of possession of stolen property. (ECF No. 4, at pp.
7 19-20). Petitioner's trial counsel requested a jury instruction on a misdemeanor charge of possession
8 of stolen property, but the request was denied by the trial court. (Exhibit 7A, at p. 3). Petitioner has
9 not explained what additional preparation his counsel could have done that would have created a
10 reasonable probability of a different trial outcome. Petitioner has failed to show that his trial counsel
11 was ineffective in failing to adequately prepare and present the defense theory of a lesser-included
12 offense or that he was prejudiced thereby. The Nevada Supreme Court ruled on petitioner's claim as
13 follows:

14 Fourth, appellant claimed that his trial counsel was ineffective for
15 failing to adequately prepare a defense for the lesser offense of
16 possession of stolen property. Appellant claimed that he should have
17 only been convicted of the lesser offense of possession of stolen
18 property. Appellant appeared to argue that possession of stolen
19 property was a lesser included offense to the crime of possession of
20 credit card without the cardholder's consent. Appellant failed to
21 demonstrate that his trial counsel was deficient or that he was
22 prejudiced. Appellant's trial counsel requested that the jury be
23 instructed on possession of stolen property, and the request was denied
24 by the district court. Appellant failed to demonstrate that further
25 preparation would have had a reasonable probability of altering the
26 outcome at trial. There was overwhelming evidence of appellant's
guilt of possession of a credit card without the cardholder's consent,
given the testimony of the victim and the police officers, and the fact
that appellant was found with the victim's credit card and her driver's
license shortly after the theft. Therefore, the district court did not err
in denying this claim.

(Exhibit 110, at pp. 4-5). The factual findings of the state court are presumed correct. 28 U.S.C.
§ 2254(e)(1). Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's
ruling was contrary to, or involved an unreasonable application of, clearly established federal law, as

1 determined by the United States Supreme Court, or that the ruling was based on an unreasonable
2 determination of the facts in light of the evidence presented in the state court proceeding. The Court
3 denies habeas relief as to Ground 2(F).

4 **IV. Certificate of Appealability**

5 In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28
6 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
7 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). A petitioner
8 must make “a substantial showing of the denial of a constitutional right” to warrant a certificate of
9 appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The
10 petitioner must demonstrate that reasonable jurists would find the district court's assessment of the
11 constitutional claims debatable or wrong.” *Id.* In order to meet this threshold inquiry, the petitioner
12 has the burden of demonstrating that the issues are debatable among jurists of reason; that a court
13 could resolve the issues differently; or that the questions are adequate to deserve encouragement to
14 proceed further. *Id.*


15 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section
16 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the
17 order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice
18 of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has
19 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
20 issuance of a certificate of appealability, and determines that none meet that standard. The Court
21 will therefore deny petitioner a certificate of appealability.

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24 **V. Conclusion**

Dated this 24th day of August, 2012.

12. 
UNITED STATES DISTRICT JUDGE